IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 27, 2001 Session

STATE OF TENNESSEE v. WILLIE GIVENS

Direct Appeal from the Criminal Court for Sumner County
No. 884-1999 Jane Wheatcraft, Judge

No. M2000-02883-CCA-R3-CD - Filed June 28, 2002

The appellant, Willie Givens, appeals his convictions by a jury in the Sumner County Criminal Court of four counts of rape of a child and eight counts of aggravated sexual battery. The trial court sentenced the appellant to consecutive terms of twenty-three years incarceration in the Tennessee Department of Correction for each rape of a child offense and concurrent terms of ten years incarceration in the Department for each aggravated sexual battery offense, resulting in an effective sentence of ninety-two years. The appellant is required to serve 100% of his sentences for rape of a child and aggravated sexual battery in accordance with the terms of Tenn. Code Ann. § 39-13-523 (1997) and Tenn. Code Ann. § 40-35-501(i) (1997). On appeal, the appellant raises the following issues for our consideration: (1) whether the trial court erred in failing to discharge juror Sadie Groves during the appellant's trial; (2) whether the trial court erred in admitting at trial audio tape recordings of extrajudicial statements made by the appellant following his offenses; (3) whether the State failed to properly elect an offense for each count of the indictment; (4) whether the evidence adduced at trial is insufficient to support the jury's verdicts; (5) whether the cumulative effect of any errors requires the reversal of the appellant's convictions and the remand of this case for a new trial; and (6) whether the trial court imposed excessive sentences. Following a thorough review of the record and the parties' briefs, we affirm in part, affirm and remand in part, reverse and remand in part, reverse and dismiss in part, and merge in part the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part, Affirmed and Remanded in Part, Reversed and Remanded in Part, Reversed and Dismissed in Part, and Merged in Part.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

David A. Gold and Lance B. Mayes, Nashville, Tennessee (on appeal), and Randy P. Lucas, Gallatin, Tennessee (at trial), for the appellant, Willie Givens.

Paul G. Summers, Attorney General and Reporter; Thomas E. Williams, III, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On November 3, 1999, a Sumner County Grand Jury indicted the thirty-five-year-old appellant for five counts of rape of a child and ten counts of aggravated sexual battery, the offenses having occurred between January 15, 1997, and January 15, 1998. The indictment arose from the appellant's sexual assault upon SS,[1] a child who was under the age of thirteen at the time of the appellant's offenses. The appellant's case proceeded to trial on July 10, 2000. In establishing the appellant's guilt, the State primarily relied upon SS's testimony and upon audio tape recordings of extrajudicial statements made by the appellant following his offenses. The appellant in turn presented the testimony of his mother and also testified in his own behalf.

SS testified at trial that she was born on July 15, 1985, and was currently fourteen years old. Her parents were divorced, and she was living alternately with her mother and her father. She had one brother named Dustin, who was seventeen years old. SS further related to the jury that she knew the appellant because he and her mother had shared an apartment when SS was eleven and twelve years old. At that time, SS resided primarily with her mother and the appellant, whereas her older brother had begun to reside primarily with his and SS's father. Accordingly, Dustin was only a periodic visitor to the apartment that SS and their mother shared with the appellant, as was the appellant's own daughter from a prior marriage.

SS recalled that, during the year in which she and her mother resided with the appellant, her mother worked during the day at a Kroger grocery store, and the appellant worked at night. Therefore, when SS returned home from school in the afternoon, she was generally alone with the appellant. SS asserted that the appellant permitted her to drink alcohol, smoke, and drive a car in her mother's absence. Moreover, at some point, the appellant began "touch[ing] [her] in places that he shouldn't."

SS provided to the jury a general description of the appellant's sexual assaults, testifying that the appellant "would start with a back rub, and then he would pull down [her] pants and [her] underwear, and he would touch [her vaginal area]." As the appellant was touching her vaginal area, he would simultaneously touch her breasts. Moreover, after several incidents during which the appellant touched SS's breasts and vaginal area, the appellant's aberrant behavior escalated to include cunnilingus. SS related that, during these incidents, she "lay there" and closed her eyes because she did not "want to look at [the appellant] or see him." Additionally, she wanted him to believe that she was asleep. SS explained that she "was scared."

[1] In accordance with this court's policy, we refer to the child victim by her initials.

SS recalled that the appellant sexually assaulted her twenty or thirty times during the course of the year in which she and her mother resided with the appellant. She specifically recalled the first occasion on which the appellant "made [her] feel uncomfortable," i.e., touched her breasts and vaginal area, estimating that the incident occurred in March 1997. She also specifically recalled the first occasion on which the appellant performed cunnilingus upon her in addition to touching her breasts and vaginal area, somewhat tentatively stating that this incident occurred in her bedroom. She next specifically identified several additional incidents in which the appellant again touched her breasts and her vaginal area and then performed cunnilingus upon her: First, she related an incident that occurred in her bedroom when she was dressed in a long t-shirt. On yet another occasion, her mother returned home from work early and interrupted the appellant's assault. Another incident occurred on a couch in the living room where SS had fallen asleep watching television. Finally, SS noted that several sexual assaults occurred in her mother's bedroom, but she was unable to identify distinguishing features of any one assault.

SS further testified that, in January 1998, the appellant and her mother terminated their relationship. SS conceded that she continued her friendship with the appellant's daughter thereafter and frequently encountered the appellant in his daughter's company. However, when the appellant approached SS's mother about reconciling, SS decided to report the appellant's prior sexual assaults to the police. SS initially reported only that the appellant had touched her breasts and her vaginal area when she was in his care. SS explained at trial that she did not immediately report the incidents of cunnilingus because she "was just scared to."

According to SS, upon reporting the appellant's assaults to the police, she met with Detective Jeff Puccini of the Sumner County Sheriff's Department at her father's home. With Puccini's assistance, SS telephoned the appellant and recorded her conversation with the appellant. At the appellant's trial, the State introduced into evidence the audio tape recording of the conversation.

During the telephone conversation, SS confronted the appellant about "rubb[ing] [her] genital area and breasts." The appellant replied that he had already promised SS that "it would never happen again, never," and he reiterated his promise. When SS inquired why he had sexually assaulted her, the appellant replied that he had done so because of "curiosity" and because he "found [her] terribly attractive." When SS remarked that she had feared he would "try to have sex with [her]," the appellant denied any such intent. The appellant also asked SS to forgive him, again stating:

> I have promised you that I would never, ever do it again, ever. For the rest of my life, for the rest of your life, ever. I can't change what happened, but I can change the future and make sure that it doesn't [happen] again. And ask for your forgiveness. And that is all I can do. If there is more that I can do, please let me know. I've always been able to talk to you as a friend, as an adult instead of a child. I've never considered you a child.

When SS suggested that she was not inclined to forgive him, the appellant asked, "Why are you being so hard on me?"

SS conceded at trial that she did not mention the incidents of cunnilingus during her telephone conversation with the appellant but reiterated that she had not yet reported the incidents of cunnilingus to the police. In this regard, SS further clarified at trial that, when she mentioned to the appellant during the telephone conversation that she had feared he would attempt to "have sex" with her, she was referring to penile intercourse. SS testified that she first reported the incidents of cunnilingus to her mother following the appellant's arrest.

SS's mother also testified on behalf of the State. She confirmed that she and SS lived with the appellant from January 1997 until January 1998 in an apartment in Hendersonville, Tennessee. At that time, she worked at a Kroger grocery store, generally working from 7:30 a.m. until 4:00 p.m. SS's mother related that the appellant worked only sporadically and was frequently at home alone with SS. In January 1998, SS's mother terminated her relationship with the appellant and, along with SS, moved out of the apartment that they shared with the appellant. Subsequently, however, SS's mother spoke with the appellant about reconciling and perhaps marrying. At this time, she learned of the appellant's sexual assaults upon her daughter.

According to SS's mother, the appellant telephoned her from jail following his arrest for the instant offenses. At Detective Puccini's direction, she recorded the conversation. During the telephone conversation, the appellant explained that he was calling in order to apologize. He also related the first occasion on which he touched SS, claiming that "it was accidental the first time." He elaborated, "[SS] asked me to rub her back. I rubbed her back and when she rolled over, they were showing and I grabbed her shirt and pulled it down." When SS's mother inquired why he had removed SS's underwear, the appellant did not respond. However, the appellant denied "kissing on [SS] down there."

The State also presented to the jury the following poem, written by the appellant immediately prior to the termination of his relationship with SS's mother:

> She has the sweetest smile . . . [a]nd her own disposition with her charm sure puts you into submission. She is so beautiful in more ways tha[n] one. On any given day she can be a lot of fun. The world is changing. We're entering a new era. She makes it worth it. She is sweet, adorable [SS].

The appellant signed the poem and included the following inscription: "To [SS]. You'll always be special to me. I love you." SS's mother conceded at trial that the appellant frequently wrote poetry for family members, including herself and her son, Dustin. However, she noted that the appellant had not included on her poem or her son's poem an inscription expressing his love for the recipient.

Detective Jeff Puccini with the Sumner County Sheriff's Department also testified on behalf of the State. He related that he initiated his investigation of the appellant's offenses on September 30, 1999. He confirmed that, on the same day, he assisted SS in telephoning the

appellant and recording the ensuing conversation. Puccini also confirmed that, at the time of the telephone call, SS had not confided to police the incidents in which the appellant performed cunnilingus upon her. Puccini noted, however, that children who have been sexually abused frequently withhold information. According to Puccini, SS finally divulged the incidents of cunnilingus on October 13, 1999.

On October 1, 1999, following SS's recorded telephone conversation with the appellant and prior to her disclosure of the appellant's acts of cunnilingus, Puccini arrested the appellant on charges of aggravated sexual battery. Upon arresting the appellant and while in Puccini's patrol car, the detective advised the appellant of his Miranda rights, and the appellant signed a written waiver of those rights. Puccini recorded his brief conversation with the appellant in his patrol car, and the State introduced an audio tape recording of the conversation.

Later on October 1, 1999, at the Sumner County Sheriff's Department, Puccini interviewed the appellant. Puccini again recorded his conversation with the appellant, and the State introduced an audio tape recording of this conversation at the appellant's trial. Puccini noted that, throughout this interview, the appellant was "very reluctant and evasive."

During the interview, the appellant preliminarily described the tenor of his relationship with SS in the following manner: "I helped her do her homework. I helped her when she had problems. Talked to her when she needed somebody to talk to. Listened to her when she needed somebody to listen [to] her. Just being a friend to her." However, when questioned concerning his sexual relationship with the child, the appellant remarked, "[M]y life is already destroyed. If [SS] says it happened, it happened."

Subsequently, as the interview progressed, the appellant attempted to both shift the blame for any sexual relationship between himself and SS to the child and also deny any sexual relationship. Specifically, the appellant suggested that SS had made sexual advances toward him, stating, "She didn't talk like a child; she didn't act a child. She talked and acted like an adult." Moreover, the appellant asserted that SS was always asking him to rub her back, her legs, and her feet and asked on isolated occasions that he rub her stomach and her hip. He related that, when he was rubbing her back, SS

> would roll over, [and] I may have brushed up against her breasts to pull her shirt back down, but as far as caressing them, I never did. As far as the vagina goes, I never touched the vagina itself. . . . [R]ight where the pubic hair starts, I rubbed there and that was once, and I rubbed her hip once.

Upon further questioning, however, the appellant seemingly admitted to being attracted to SS and rubbing her breasts and vaginal area. The appellant stated, "Keeping on rubbing was wrong and after awhile I quit because it was wrong." He further elaborated, "I'm not denying that something didn't happen. I'm not denying that I need help; I do. There is something wrong with

me for letting it go that far. I want help. I need help. . . . I feel like I should be took out back and shot."

Immediately following the above plea for assistance, the appellant once again attempted to minimize his offenses, stating:

> You are wanting me to tell you what you believe and what everybody believes and what everybody else wants to hear. It did go far, but not as far as everybody says it is going. Me and [SS] has had this talk once before, where she said that I had rubbed her vagina and I rubbed her breasts and I said "[SS], they were touched and they were touched trying to cover you up". I just got tired of arguing about it. I told her I felt bad that they even got touched, that it shouldn't ever have gone to that extreme. She would always bring it back up.

The appellant concluded the interview by admitting to placing his hand on SS's breasts and vagina "[o]nce or twice" and describing his subsequent efforts to "stay away from [SS] . . . [b]ecause I knew what happened was wrong and I didn't want it to happen again."

In defense, the appellant presented the testimony of his mother, Linda Givens, that SS continued her friendship with the appellant's daughter between 1998 and 1999. Specifically, SS would spend the night with Givens' granddaughter at Givens' home. Moreover, "[i]t was lots of times whenever [the appellant] would have his daughter and he would take [SS] home and she would be with him." According to Givens, SS did not appear to be afraid of the appellant, albeit Givens' granddaughter was always present when SS was with the appellant. Givens also recalled that, following the termination of the appellant's relationship with SS's mother, SS occasionally telephoned Givens' home and inquired if the appellant was there.

The appellant testified in his own behalf that his relationship with SS "was more like me being more like a big brother to her or a friend." He further expounded, "When she had a problem with her homework, I would help her with her homework. If somebody was picking on her, you know, I'd give her advice. If she felt down about herself and she felt ugly, I would pick her up." The appellant conceded that he regularly rubbed SS's back, just as he did his own daughter's, but denied engaging in any sexual activity with SS.

Rather, the appellant claimed that any inappropriate contact with SS was accidental. Accordingly, he explained his audio-taped statements to SS and her mother in the following manner:

> My apologies to [SS], and even my apologies to [SS's mother] were, you know, I felt bad because of whenever I rubbed her back or whatever she would be, like, asleep; and when she rolled over, she was exposed, so I would pull her shirt back down, as I would my daughter. If my daughter was exposed, I would pull her shirt back down. During a couple of times when I was pulling her shirt back down, I brushed, like, the side there, and I apologized for that because I thought that was wrong.

As to his statements to Puccini, the appellant confirmed that on one occasion he rubbed the lower part of SS's stomach, but he asserted that he otherwise told Puccini "what [the detective] wanted to hear so [Puccini] would leave me alone." The appellant further claimed that he only asked Puccini for help because he was depressed by the accusations that he had sexually assaulted SS.

At the conclusion of the evidence, the State requested the entry of an order of nolle prosequi with respect to one count of rape of a child and two counts of aggravated sexual battery. Moreover, the State announced that it would be electing offenses for each remaining count of the indictment during its closing argument. Following closing arguments and the trial court's provision of instructions, the jury deliberated and returned guilty verdicts for the remaining four counts of rape of a child and eight counts of aggravated sexual battery. The trial court conducted a sentencing hearing on September 19 and 21, 2000, at the conclusion of which it imposed an effective sentence of ninety-two years incarceration in the Tennessee Department of Correction. The appellant now appeals both his convictions and sentences.

II. Analysis

A. The Trial Court's Failure to Discharge Juror Sadie Groves

The appellant first contends that the trial court violated his right to a trial by an impartial jury in failing to discharge juror Sadie Groves and replace her with an alternate juror or, alternatively, declare a mistrial. The State responds that the trial court acted within the ambit of its broad discretion.

The record reflects that, following testimony by SS's mother and during Puccini's testimony, Groves notified the court that she had worked with SS's mother at a Kroger grocery store approximately three years prior to the appellant's trial. The court in turn notified the State and the appellant of Groves' prior acquaintance with SS's mother and indicated that, due to the reportedly casual nature of the acquaintance, it was not inclined to discharge the juror. Moreover, at the request of the State and the appellant, the trial court permitted the parties to question Groves on the record and outside the presence of the other jurors to confirm her impartiality. In response to the parties' questioning, Groves explained that she had not notified the court earlier of her acquaintance with SS's mother because "I didn't know her name, but when I saw her face, I recognized her face." The juror elaborated that she and SS's mother were not friends at the time of their employment at Kroger but occasionally chatted during breaks. Groves concluded that her prior acquaintance with SS's mother would not affect her ability to remain impartial in deliberating the appellant's case. Following Groves' testimony, both parties seemingly acquiesced in the trial court's determination that she was qualified to perform her duties as a juror.

Preliminarily, the appellant's failure to object to Groves' continued service on the jury and his failure to raise this issue in his motion for new trial result in the waiver of this issue on appeal. Tenn. R. App. P. 36(a); Tenn. R. App. P. 3(e). Accordingly, as effectively conceded by the appellant, any review of the trial court's assessment of Groves' qualification as a juror lies entirely within our discretion. Tenn. R. Crim. P. 52(b). Moreover, the appellant has failed to demonstrate

that any clear and unequivocal rule of law has been breached. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000).

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee an accused in a criminal prosecution the right to a trial by an impartial jury. Consistent with these constitutional guarantees, this court has previously observed that "[b]oth the defendant and the State are entitled to a fair trial by unbiased jurors and it is the duty of the Trial Judge to discharge any juror who for any reason cannot or will not do his duty in this regard." Walden v. State, 542 S.W.2d 635, 637 (Tenn. Crim. App. 1976); see also Tenn. Code Ann. § 22-1-106 (1994); cf. Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985). Moreover, Tenn. R. Crim. P. 24(e)(1) clearly contemplates the replacement of a juror with an alternate if at any time prior to the jury's withdrawal to consider its verdict the trial court finds the juror "to be unable or disqualified to perform [her] duties." See, e.g., State v. Max, 714 S.W.2d 289, 292-294 (Tenn. Crim. App. 1986); State v. Livingston, 607 S.W.2d 489, 491-492 (Tenn. Crim. App. 1980). If an alternate is unavailable, the trial court must declare a mistrial. Cf. State v. McCray, 614 S.W.2d 90, 91-94 (Tenn. Crim. App. 1981). In any event, the determination of whether a juror is unable or disqualified to perform her duties lies within the sound discretion of the trial court. State v. Forbes, 918 S.W.2d 431, 451 (Tenn. Crim. App. 1995); State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989); McCray, 614 S.W.2d at 93; State v. Clifford Coleman, Sr., No. M2000-01916-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 84, at *39 (Nashville, January 31, 2002).

Again, Groves unequivocally stated that her prior casual acquaintance with SS's mother would not affect her impartiality in deliberating the appellant's case. "In many instances, [a] . . . juror's acceptability will depend on the believability of the avowal as to impartiality." State v. Kenneth Paul Dykas, No. M2000-01665-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 160, at *24 (Nashville, March 5, 2002). The principal rationale for granting a trial court discretion in determining a juror's "acceptability" lies in the court's ability to "observe the demeanor and credibility of the juror." Forbes, 918 S.W.2d at 451; see also State v. Smith, 993 S.W.2d 6, 29 (Tenn. 1999); State v. Harris, 839 S.W.2d 54, 64 (Tenn. 1992). Indeed, our supreme court has held that a trial court's finding of impartiality may be overturned only for "'manifest error.'" State v. Howell, 868 S.W.2d 238, 248 (Tenn. 1993)(citing Patton v. Yount, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 2889 (1984)). In other words, the burden rests on the appellant to establish by clear and convincing evidence that the court's finding of impartiality was erroneous. Smith, 993 S.W.2d at 29; Harris, 839 S.W.2d at 64. Finding no manifest error, we cannot conclude that the trial court abused its discretion in failing to replace Groves with an alternate juror or declare a mistrial. Cf. Livingston, 607 S.W.2d at 492; Coleman, No. M2000-01916-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 84, at **38-40.

We note in passing the appellant's reliance upon State v. Lynn, 924 S.W.2d 892 (Tenn. 1996), in challenging the trial court's determination of Groves' qualification as a juror. Specifically, the appellant cites the supreme court's holding in Lynn that "improper and unnecessary

deviations from [mandatory] statutory jury selection procedures . . . [may] constitute prejudice to the administration of justice" requiring the reversal of a defendant's conviction. Id. at 898. However, as noted by the State, the appellant fails to specify any such improper or unnecessary deviation in his case. Rather, his complaint is with the trial court's finding of Groves' impartiality. This issue is without merit.

B. The Trial Court's Introduction into Evidence of Audio Tape Recordings of the Appellant's Extrajudicial Statements

The appellant next challenges the trial court's introduction into evidence of audio tape recordings of extrajudicial statements made by him following his offenses. Although the appellant's brief is somewhat lacking in clarity, he apparently rests his complaint upon four separate grounds: (1) the State failed to disclose the audio tape recordings to the appellant prior to trial as required by Tenn. R. Crim. P. 16(a)(1)(A) and the trial court's "Standing Discovery Order"; (2) pursuant to Tenn. R. Evid. 401 and 402, the contents of the audio tape recordings were relevant only to the charges of aggravated sexual battery, and the trial court failed to provide an appropriate limiting instruction forestalling the jury's consideration of the recordings in determining the appellant's guilt or innocence of the charges of rape of a child; (3) pursuant to Tenn. R. Evid. 403, the contents of the audio tape recordings were unfairly prejudicial; and (4) the introduction of the audio tape recordings forced the appellant to relinquish his privilege against self-incrimination and testify in his own behalf.[2] The appellant acknowledges his failure to object to the introduction of the audio tape recordings at trial, Tenn. R. Evid. 103(a)(1); Tenn. R. App. P. 36(a),[3] or raise this issue in his motion for new trial, Tenn. R. App. P. 3(e), but nevertheless asks this court to review the introduction of the recordings as plain error, Tenn. R. Crim. P. 52(b). The State essentially responds that the appellant has failed to satisfy the standard adopted in Smith, 24 S.W.3d at 282-283, for determining whether a trial error rises to the level of plain error in the absence of an objection at trial.

---

[2]Notably, the appellant does not challenge the authentication of the audio tape recordings. Tenn. R. Evid. 901. Moreover, the appellant does not claim that any audio-taped comments or questions by individuals other than the appellant constitute inadmissible hearsay. To the extent any such comments or questions constitute hearsay and, moreover, tend to incriminate the appellant, he either expressly or implicitly manifested an adoption or belief in their truth, Tenn. R. Evid. 803(1.2)(B); cf. State v. Black, 815 S.W.2d 166, 176-177 (Tenn. 1991); State v. Frankie E. Casteel, No. E1999-00076-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 248, at **65-76 (Knoxville, April 5, 2001), perm. to appeal denied, (Tenn. 2001), or he acquiesced to their introduction into evidence for the tactical purpose of demonstrating that he did not manifest such an adoption, Smith, 24 S.W.3d at 282. Finally, we conclude that substantial justice does not require our consideration of the trial court's failure to redact any oblique references in the audio tape recordings to crimes, wrongs, or acts by the appellant, other than those encompassed by the indictment and admissible pursuant to State v. Rickman, 876 S.W.2d 824, 828-829 (Tenn. 1994), particularly in light of the weight of the remaining evidence. Smith, 24 S.W.3d at 282.

[3]The appellant claims in his brief that, although he did not object to the introduction into evidence of the audio tape recordings, he did object to "the context in which [they] [were] used." The record, however, contains no such objections by the appellant. In this regard, we specifically note that "contemporaneous[] attempt[s] [by the appellant] to properly place the statements in context" by cross-examining the State's witnesses do not qualify as objections.

We agree with the State that the appellant has failed to establish plain error. Indeed, we can quickly dispense with the appellant's allegation that the State failed to disclose the audio tape recordings to the appellant prior to trial in accordance with either Tenn. R. Crim. P. 16(a)(1)(A) or any "Standing Discovery Order" as the record does not support this allegation, Smith, 24 S.W.3d at 282, and "[s]tatements in briefs as to what occurred in the trial court cannot be considered unless they are supported by the record," Max, 714 S.W.2d at 293.[4] Moreover, the appellant has otherwise failed to establish that the introduction of the audio tape recordings breached a clear and unequivocal rule of law or, alternatively, that consideration of any error is necessary to do substantial justice. Smith, 24 S.W.3d at 282.

The admissibility of evidence lies within the sound discretion of the trial court, and an appellate court will not interfere with the lower court's exercise of that discretion absent a clear showing of abuse. State v. Carruthers, 35 S.W.3d 516, 574 (Tenn. 2000), cert. denied, 533 U.S. 953, 121 S. Ct. 2600 (2001). The trial court's discretion in determining the admissibility of evidence is generally circumscribed by the Tennessee Rules of Evidence, including evidentiary rules of relevance. Again, the appellant in this case relies upon Tenn. R. Evid. 401 and 402 in maintaining the limited relevance of his audio-taped statements. Tenn. R. Evid. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 402 in turn states the somewhat obvious rule that relevant evidence will usually be admissible whereas evidence that is not relevant is not admissible.

The appellant specifically asserts that his audio-taped statements, to the extent they constituted confessions, were confessions solely to the charges of aggravated sexual battery. The appellant concludes, therefore, that the statements were relevant solely to the charges of aggravated sexual battery, and the jury could not consider the statements in determining his guilt or innocence of the charges of rape of a child. Although he relies upon Tenn. R. Evid. 401 and 402, the appellant essentially invokes Tenn. R. Evid. 404(b)'s proscription against the State's use of evidence of other crimes, wrongs, or acts to establish any generalized propensity on the part of a defendant to commit crimes. However, in State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994), our supreme court reaffirmed the special rule "admitting evidence of other sex crimes [between a defendant and his victim] when an indictment is not time specific and when the evidence relates to sex crimes that allegedly occurred during the time as charged in the indictment." In other words, the court reaffirmed that, under those limited circumstances,

> "evidence of other . . . [sex crimes] both prior and subsequent to the act charged in the indictment is competent, as tending to establish the commission of the special act under examination, as corroborative of

[4] We note that, in its response to the appellant's "Motion for a Bill of Particulars," the State asserted that it had "provided everything in the case file to the defense including all interviews and taped statements." At no time prior to or during trial did the appellant dispute this assertion.

> the evidence of witnesses testifying thereto, and for the purpose of showing the relation of the parties."

Id. at 828; see also State v. Hodge, 989 S.W.2d 717, 722 (Tenn. Crim. App. 1998); State v. William Donald Ellis, __ S.W.3d __, No. M1999-783-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 783, at **44-45 (Nashville, October 13, 2000), perm. to appeal denied and recommended for publication, (Tenn. 2001).

Indeed, absent the special rule set forth in Rickman, the appellant's complaint would presumably and more properly have been the subject of a pre-trial motion for severance of offenses pursuant to Tenn. R. Crim. P. 14 rather than a request during trial for a limiting instruction pursuant to Tenn. R. Evid. 105. In light of the rule set forth in Rickman, we note that the indictment in this case is not time specific, instead alleging that both the aggravated sexual battery offenses and the child rape offenses occurred between January 15, 1997, and January 15, 1998. Accordingly, evidence of any unlawful sexual activity between the appellant and SS during that time period was relevant in establishing the appellant's guilt of each individual count of either rape of a child or aggravated sexual battery.

Of course, the appellant also argues that the evidence was inadmissible pursuant to Tenn. R. Evid. 403. That rule provides that even relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." Id. As noted by the appellant, evidence is unfairly prejudicial when its primary purpose "is to elicit emotions of 'bias, sympathy, hatred, contempt, retribution, or horror.'" State v. Collins, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998). However, contrary to the appellant's assertion in his brief, the prejudicial effect of the bulk of the audio-taped statements introduced in this case was no more than that which "naturally flows from all admissible evidence [that] is intended to persuade the trier of fact." State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App. 1995). In short, "the mere fact that evidence is particularly damaging does not make it unfairly prejudicial." State v. Gentry, 881 S.W.2d 1, 7 (Tenn. Crim. App. 1993); see also State v. Jerry Lee Hunter, No. 01C01-9411-CC-00391, 1996 Tenn. Crim. App. LEXIS 12, at *16 (Nashville, January 11, 1996)(observing that "any evidence, whether introduced by the prosecution or the defense, is prejudicial"). Moreover, as noted supra, note 2, substantial justice does not require our consideration of the trial court's failure to redact any oblique references in the audio tape recordings to crimes, wrongs, or acts by the appellant, other than those encompassed by the indictment and admissible pursuant to Rickman, 876 S.W.2d at 828-829, particularly in light of the weight of the remaining evidence. Smith, 24 S.W.3d at 282.

Similarly without merit is the appellant's suggestion in his brief that the introduction of his audio-taped statements "forced" him to relinquish his privilege against self-incrimination and testify "as to the context in which [the statements] were meant." Specifically, the appellant asserts that he was forced to testify in order to explain that his audio-taped statements were made in response to questions concerning sexual contact rather than sexual penetration. Had the introduction

of the appellant's audio-taped statements constituted error, the adjustment of the appellant's defense to respond to the introduction of the statements would likely have been germane to any assessment of the harmlessness of the error. However, we have already concluded that the appellant's audio-taped statements were largely admissible. Under these circumstances, to accept the appellant's argument would be to transform the opportunity afforded every criminal defendant to respond to the prosecution's evidence into a violation of the privilege against self-incrimination. In any event, we note that the context of the appellant's audio-taped statements was made abundantly clear by the State's own witnesses. The appellant is not entitled to relief.

C. The State's Election of Offenses

In his original brief, the appellant peripherally challenged the State's failure to elect an offense for each count of the indictment in contesting the sufficiency of the evidence underlying his convictions. Due to the manner in which the appellant raised the election issue, the State declined to address the issue in its own brief. Accordingly, during oral argument, this court ordered the State to submit a supplemental brief specifically addressing the issue of election and afforded the appellant an opportunity to respond. In accordance with this court's order, the State submitted a supplemental brief asserting that the appellant had waived the election issue by failing to raise it in his motion for new trial, Tenn. R. App. P. 3(e), by failing to raise the issue in his original brief, Tenn. R. App. P. 27(a)(4) & (7); Tenn. Ct. Crim. App. R. 10(b), and, most importantly, by failing to ensure that the record on appeal included "a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b). The State specifically noted that the State had elected offenses during its closing argument, and the record did not contain a transcript of the closing arguments. The appellant in turn submitted a supplemental brief arguing that the State's failure to elect an offense for each count of the indictment constitutes plain error. Tenn. R. Crim. P. 52(b). Inexplicably, the appellant did not seek supplementation of the record.

We agree with the State that the appellant's failure to ensure the completeness of the record normally would have entailed waiver of the election issue, Tenn. R. App. P. 24(b); Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997), and, moreover, prevented our consideration of the issue pursuant to the plain error doctrine, Tenn. R. Crim. P. 52(b); cf. Smith, 24 S.W.3d at 282-283. However, notwithstanding the appellant's omission and any resultant waiver, it plainly appeared on the face of the record submitted by the appellant that the evidence adduced by the State at trial is insufficient to support all eight convictions of aggravated sexual battery under our supreme court's decision in State v. Johnson, 53 S.W.3d 628, 633 (Tenn. 2001). Because the record did not include the State's election of offenses, we could not say with any certainty the precise relief warranted, only that some relief clearly was warranted. Accordingly, in the interests of justice and judicial economy, we sua sponte ordered supplementation of the record to include a transcript of the closing arguments, Tenn. R. App. P. 24(e), and we now address the merits of both the issue of election of offenses and the issue of the sufficiency of the evidence underlying the appellant's convictions.

We reiterate that, when an indictment charges that a number of sexual offenses occurred over a span of time, the State may introduce evidence of any unlawful sexual activity between the defendant and the victim allegedly occurring during that span of time. Rickman, 876 S.W.2d at 828-829. However, at the conclusion of its case-in-chief, the State must elect the particular incident for which a conviction is being sought. Burlison v. State, 501 S.W.2d 801, 803-804 (Tenn. 1973); see also Johnson, 53 S.W.3d at 630; State v. Kendrick, 38 S.W.3d 566, 568 (Tenn. 2001); State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999); Rickman, 876 S.W.2d at 829. As remarked by the appellant, this requirement of election serves several purposes: (1) it enables the defendant to prepare for the specific charge; (2) it protects a defendant against double jeopardy; (3) it ensures the jurors' deliberation over and their return of a verdict based upon the same offense; (4) it enables the trial judge to review the weight of the evidence in its role as the thirteenth juror; and (5) it enables an appellate court to review the legal sufficiency of the evidence. Brown, 992 S.W.2d at 391. A defendant's right under our state constitution to a unanimous jury verdict is the most serious concern. State v. Shelton, 851 S.W.2d 134, 137 (Tenn. 1993).[5] Moreover, because the election requirement is "fundamental, immediately touching the constitutional rights of an accused," a trial court has a duty even absent a request by the defendant to ensure the timely election of offenses by the State and to properly instruct the jury concerning the requirement of a unanimous verdict. Burlison, 501 S.W.2d at 804.[6]

In accordance with the above principles, our supreme court in Tidwell v. State, 922 S.W.2d 497, 501-502 (Tenn. 1996), specifically rejected the State's argument that, when a victim is unable to recount any specifics about multiple incidents of abuse except that the defendant engaged her in sexual intercourse on numerous occasions, "'jury unanimity is attained . . . because, although the jury may not be able to distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described.'" See also e.g., State v. Michael Thomason, No. W1999-02000-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 229, at **29-30 (Jackson, March 7, 2000)(holding that the State did not sufficiently elect an offense upon which to base a conviction of sexual battery when the victim testified concerning multiple incidents

---

[5] We particularly note our supreme court's observation in Shelton, 851 S.W.2d at 137, that, "[i]n practice, . . . election at the end of the state's proof does little to aid the defendant in preparing his defense. A defendant is obviously better served by requesting a bill of particulars before trial, pursuant to Tenn. R. Crim. P. 7(c)." The appellant in this case did, in fact, request a bill of particulars, which motion the trial court denied. To the extent the appellant seeks to challenge the trial court's denial of his motion for a bill of particulars, he has waived this issue pursuant to Tenn. R. App. P. 27(a)(4) & (7) and Tenn. Ct. of Crim. App. Rule 10(b). Cf. generally State v. Hicks, 666 S.W.2d 54 (Tenn. 1984); cf. also State v. Michael Thomason, No. 02C01-9903-CC-00086, 2000 Tenn. Crim. App. LEXIS 229, at **19-22 (Jackson, March 7, 2000). Moreover, we decline to exercise our discretion to review this issue pursuant to Tenn. R. Crim. P. 52(b).

[6] In Johnson, 53 S.W.3d at 635, the court clarified that, contrary to the appellant's suggestion in his brief, there is no requirement that the trial court provide an "enhanced unanimity instruction." Rather, "[t]he election requirement itself alleviates any unanimity concerns." Id.

in 1995 when the defendant "'touched [her] inappropriately'" but could not recall any specific incident). However, recognizing the practical difficulties present in applying the election requirement in cases of child sexual abuse, our supreme court has granted that

> the state is not required to identify the particular date of the chosen offense. . . . [A] particular offense can often be identified without a date.
>
> If, for example, the evidence indicates various types of abuse, the prosecution may identify a particular type of abuse and elect that offense. Moreover, when recalling an assault, a child may be able to describe unique surroundings or circumstances that help to identify an incident. The child may be able to identify an assault with reference to a meaningful event in his or her life, such as the beginning of school, a birthday, or a relative's visit. Any description that will identify the prosecuted offense for the jury is sufficient.

Shelton, 851 S.W.2d at 137-138 (citation and footnote omitted).

A review of the transcript of the closing arguments confirms that the State attempted to identify a specific offense for each count of the indictment by describing unique surroundings or circumstances. For Count One charging the appellant with aggravated sexual battery by touching SS's breasts, Count Six charging the appellant with aggravated sexual battery by touching SS's vaginal area, and Count Eleven charging the appellant with rape of a child, the State elected the incident that occurred in SS's bedroom when she was dressed in a long t-shirt. For Count Two charging the appellant with aggravated sexual battery by touching SS's breasts, Count Seven charging the appellant with aggravated sexual battery by touching SS's vaginal area, and Count Twelve charging the appellant with rape of a child, the State elected the incident that abruptly concluded when SS's mother returned home from work early. For Count Three charging the appellant with aggravated sexual battery by touching SS's breasts, Count Eight charging the appellant with aggravated sexual battery by touching SS's vaginal area, and Count Thirteen charging the appellant with rape of a child, the State elected the incident that occurred on a couch in the living room. Finally, for Count Four charging the appellant with aggravated sexual battery by touching SS's breasts, Count Nine charging the appellant with aggravated sexual battery by touching SS's vaginal area, and Count Fourteen charging the appellant with rape of a child, the State elected the incident "that occurred in [SS's] mother's bedroom." As noted previously, SS testified that all of the above incidents began with the appellant rubbing her back, progressed to the appellant's touching of her breasts and vaginal area, and concluded with cunnilingus.

In addressing the adequacy of the State's election of offenses, we note that election of offenses during closing argument rather than at the close of the State's case-in-chief does not technically satisfy the requirements of Burlison, 501 S.W.2d at 803-804. See also State v. Paul

Ralph Leath, No. 01C01-9511-CC-00392, 1998 Tenn. Crim. App. LEXIS 655, at *21 (Nashville, June 17, 1998). Nevertheless, we have repeatedly indicated that the timing of the State's election will not alone afford an appellant relief. See, e.g., State v. Jeffrey L. Marcum, No. W2000-02698-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 70, at *21 (Jackson, January 23, 2002); State v. Michael J. McCann, No. M2000-2990-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 840, at *17 (Nashville, October 17, 2001), perm. to appeal denied, (Tenn. 2002); Ellis, __ S.W.3d __, No. M1999-783-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 783, at *24 n. 2; State v. Kenneth Lee Herring, No. M1999-00776-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 684, at **20-22 (Nashville, August 24, 2000), perm. to appeal denied, (Tenn. 2001); State v. Billy Bivens, No. E1999-00086-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 557, at **20-21 (Knoxville, July 14, 2000), perm. to appeal dismissed, (Tenn. 2000). Moreover, we conclude that the State's election of offenses sufficed with the exception of its election of the incident that occurred in SS's mother's bedroom for Counts Four, Nine, and Fourteen. SS testified that several incidents, each entailing all three forms of abuse, occurred in her mother's bedroom, and she was unable to distinguish between the several incidents. Accordingly, we must reverse the appellant's convictions pursuant to Counts Four, Nine, and Fourteen. Moreover, in light of our ensuing discussion concerning the sufficiency of the evidence, we dismiss Count Nine of the indictment and remand Counts Four and Fourteen to the trial court for a new trial or other proceedings consistent with this opinion. Cf. Brown, 992 S.W.2d at 392.

D. Sufficiency of the Evidence

Turning to the sufficiency of the evidence underlying the appellant's remaining convictions, we have no difficulty concluding beyond a reasonable doubt that a "reasonable trier of fact" could accredit SS's testimony at trial concerning the three distinct occasions elected by the State on which she was eleven or twelve years old[7] and the appellant touched her breasts and vaginal area in addition to performing cunnilingus upon her. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). Indeed, the appellant's own audio-taped statements considerably bolstered SS's testimony. Moreover, we have no difficulty concluding that SS's testimony supports the appellant's convictions for Counts Eleven, Twelve, and Thirteen of rape of a child as defined in Tenn. Code Ann. § 39-13-522 (1996). However, the appellant's convictions for Counts One, Two, Three, Six, Seven, and Eight of aggravated sexual battery as defined in Tenn. Code Ann. § 39-13-504(a)(4)(1997) present something more of a problem.

In this regard, we first wish to emphasize that the appellant's convictions of rape of a child for performing cunnilingus upon SS on the three distinct occasions elected by the State did not preclude the appellant's convictions of aggravated sexual battery for touching SS's breasts and touching her vaginal area on the same three occasions. Cf. State v. Barney, 986 S.W.2d 545, 548-550 (Tenn. 1999); State v. Phillips, 924 S.W.2d 662, 664-665 (Tenn. 1996); cf. State v. Randall Ray

[7] The appellant suggests in his brief that the State was required to provide documentary evidence of SS's age at the time of his offenses. The appellant cites no authority for this proposition, and we wholly reject it.

Mills, No. M2000-01065-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 837, at **19-23 (Nashville, October 17, 2001), perm. to appeal denied, (Tenn. 2002). However, inasmuch as SS testified that the touching of her breasts and the touching of her vaginal area occurred virtually simultaneously on each occasion, the evidence adduced at trial could not support more than one conviction of aggravated sexual battery for each occasion. Johnson, 53 S.W.3d at 633. In short, there was insufficient evidence adduced at trial to support all six of the appellant's remaining convictions of aggravated sexual battery. Accordingly, the appellants convictions of aggravated sexual battery for Counts Six, Seven, and Eight are merged into his convictions of aggravated sexual battery for Counts One, Two, and Three.

E. Cumulative Error

The appellant also contends that the combination of errors committed in the trial court denied him a fair trial. State v. Brewer, 932 S.W.2d 1, 28 (Tenn. Crim. App. 1996). We have addressed any errors occurring in the trial court by reversing the appellant's convictions of rape of a child and aggravated sexual battery for Counts Four, Nine, and Fourteen of the indictment, and merging his remaining convictions of aggravated sexual battery. The appellant is not otherwise entitled to relief.

F. Sentencing

Finally, the appellant challenges the length of his sentences for rape of a child and aggravated sexual battery. Specifically, the appellant challenges the trial court's application of Tenn. Code Ann. 40-35-114(7) & (15) (1996) to enhance his sentences above "the minimum sentence in the range." The State responds that "[t]he record and the law support the trial court's [sentencing] determination[s]."

At the sentencing hearing in this case, the State submitted a pre-sentence investigation report. With respect to the appellant's background, the report reflects that the appellant graduated from high school in 1982 and served in the United States Navy from 1986 until 1989, at which time he received an honorable discharge. Additionally, the appellant related to the investigating officer who prepared the report that he was employed as a security guard by Rock-Solid Security and various Nashville nightclubs from 1993 until 1998 and maintained disparate employment thereafter until his trial for the instant offenses. The appellant further reported that he had been married prior to these offenses, and the marriage had produced one daughter before concluding in divorce. According to the appellant, he owed approximately $8,000 in child support. Finally, the appellant's criminal record consisted of one prior misdemeanor conviction in 1994 of writing worthless checks, and he denied past abuse of alcohol or illegal drugs.

With respect to his convictions of rape of a child and aggravated sexual battery in this case, the appellant included the following statement in the pre-sentence investigation report:

> My [convictions] [are] an outrage and a travesity [sic]. I am innocent tho [sic] found guilty. My lawyer was incompintant [sic] and the D.A. committed purgery [sic]. All this can be proved. Judge denied my right to counsil [sic] of my choose [sic]. This also can be proven. The trial was a joke and the D.A. got their [sic] way. God will judge them in the end on judgment day. It is out of my hands except for appeals and law suits. I am not a problem or a criminal. I have God in my life. More now than ever. I am a good, kind-hearted person[.] I've been working security for 18 years until '98. I am no trouble [n]or wish to be.

The appellant also made an "allocution statement" at the sentencing hearing in which he again asserted his innocence but magnanimously forgave the victim and her family.

In addition to the pre-sentence investigation report, the State presented the testimony of SS's father at the sentencing hearing. He testified that the appellant's offenses

> changed our family. The trust of other people has been gone from at least my perspective. I am worried about my daughter's trust of other people in the future. I'm worried that it has damaged her. I would say in particular now, even more so in the future, how she handles any oncoming male relationships.

SS's father added that SS was currently undergoing counseling and appeared to be responding well. He concluded by asking the court to impose the harshest possible sentence upon the appellant.

In determining the length of the appellant's sentences for rape of a child and aggravated sexual battery, the trial court noted its consideration of the evidence adduced at the sentencing hearing, including the pre-sentence investigation report; the evidence adduced at trial; and "the principles of sentencing as set out in the Code." More specifically, the trial court declined to find any mitigating factors while noting the presence of enhancement factors relating to the appellant's commission of the offenses for the purpose of gratifying his desire for pleasure or excitement, Tenn. Code Ann. § 40-35-114(7), and his abuse of a position of private trust, Tenn. Code Ann. § 40-35-114(15). On the basis of these enhancement factors, the court imposed the appellant's sentences of twenty-three years incarceration for each rape of a child offense and ten years incarceration for each aggravated sexual battery offense. Moreover, the court ordered consecutive service of the appellant's sentences for rape of a child pursuant to Tenn. Code Ann. § 40-35-115(5) (1997). Again, in this appeal, the appellant challenges solely the length of his sentences.

Appellate review of the length of a sentence is de novo. Tenn. Code. Ann. § 40-35-401(d) (1997). Like the trial court below, this court considers the following factors in conducting its de novo review: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4)

the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the defendant in his own behalf; and (7) the potential for rehabilitation or treatment. Tenn. Code. Ann. § 40-35-102, -103, & -210 (1997); see also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). However, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, we will accord the trial court's sentencing determinations a presumption of correctness. Tenn. Code Ann. § 40-35-401(d); Ashby, 823 S.W.2d at 169. Regardless, the burden is upon the appellant to demonstrate the impropriety of his sentences. State v. Grigsby, 957 S.W.2d 541, 544 (Tenn. Crim. App. 1997); State v. Loden, 920 S.W.2d 261, 266 (Tenn. Crim. App. 1995).

In deciding whether to accord the trial court's sentencing determinations a presumption of correctness in this case, we initially note that the court failed to state the specific facts underlying its application of each enhancement factor. Our supreme court has previously emphasized that,

> [t]o facilitate meaningful appellate review, the Act provides that the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994); see also Tenn. Code Ann. § 40-35-209(c) (1997); Tenn. Code Ann. § 40-35-210(f); State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997). Moreover, the trial court incorrectly applied an enhancement factor in determining the length of the appellant's sentences for aggravated sexual battery. Accordingly, our review is entirely de novo.

The rape of a child is a class A felony, Tenn. Code Ann. § 39-13-522(b), and aggravated sexual battery is a class B felony, Tenn. Code Ann. § 39-13-504(b). As a standard Range I offender, therefore, the appellant was subject to a sentencing range of not less than fifteen nor more than twenty-five years for each rape of a child offense and a sentencing range of not less than eight nor more than twelve years for each aggravated sexual battery offense. Tenn. Code Ann. § 40-35-112(a)(1) & (2) (1997). The statutorily prescribed procedure for determining the length of a felony sentence within the appropriate range is set forth in Tenn. Code Ann. § 40-35-210. That statute provides that the presumptive sentence for a class A felony is the midpoint of the range, and the presumptive sentence for a class B felony is the minimum sentence in the range. Id. at (c). However, if there are enhancement factors and no mitigating factors, then a court may impose a sentence that is above the presumptive sentence but within the applicable range. Id. at (d); see also, e.g., State v. Chance, 952 S.W.2d 848, 850-851 (Tenn. Crim. App. 1997). If there are both enhancement and mitigating factors, the court must start at the presumptive sentence within the range, enhance the sentence within the range as appropriate for the applicable enhancement factors, and then reduce the sentence within the range as appropriate for applicable mitigating factors. Tenn. Code Ann. § 40-35-210(e); Chance, 952 S.W.2d at 850-851.

The appellant does not dispute the trial court's failure to apply any mitigating factors to his convictions of rape of a child and aggravated sexual battery, and, pursuant to our de novo review, we agree with the trial court that none of the twelve specific mitigating factors set forth in Tenn. Code Ann. § 40-35-113 (1997) are applicable in this case. We particularly note that, because "serious bodily injury" within the meaning of Tenn. Code Ann. § 40-35-113(1) encompasses psychological injury, State v. Smith, 910 S.W.2d 457, 461 (Tenn. Crim. App. 1995); State v. Patrick Kossow, No. M2000-01871-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 651, at *16 (Nashville, August 23, 2001), perm. to appeal denied, (Tenn. 2002), "it 'is difficult to conceive of any factual situation where the rape [or sexual battery] of a child would not threaten serious bodily injury,'" State v. Joseph E. Suggs, No. M1999-02136-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 799, at *4 (Nashville, October 4, 2000), perm. to appeal denied, (Tenn. 2001). But see Hayes, 899 S.W.2d at 187; but cf. State v. Carico, 968 S.W.2d 280, 286 (Tenn. 1998).

Our de novo review further prompts us to briefly address the applicability of the "catch-all" mitigating circumstance contained in Tenn. Code Ann. § 40-35-113(13). Pursuant to Tenn. Code Ann. § 40-35-113(13), a good record of employment will generally afford a defendant some mitigation. See, e.g., State v. Kelley, 34 S.W.3d 471, 483 (Tenn. Crim. App. 2000). As previously indicated, the appellant in this case reported to the investigating officer who prepared the pre-sentence investigation report that he had maintained employment since 1993. Yet, the investigating officer was largely unable to verify the appellant's record of employment. Moreover, in contrast to the evidence presented at the sentencing hearing, testimony at trial by both the appellant and SS's mother established that the appellant's lack of steady employment was a major point of contention in their relationship. Indeed, the appellant candidly admitted at trial that his record of employment "hasn't been the best in the world."[8] Of course, military service culminating in an honorable discharge is also a proper basis for mitigation under Tenn. Code Ann. § 40-35-113(13). See, e.g., State v. Joe C. Anderson, No. E1999-02485-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 707, at **21-22 (Knoxville, September 12, 2000), perm. to appeal denied, (Tenn. 2001). Nevertheless, under the circumstances of this case, the appellant's military service weighs minimally in the balance.

With respect to the trial court's application of enhancement factors, we must agree with the appellant that the trial court incorrectly applied enhancement factor (7) to his convictions of aggravated sexual battery as that offense necessarily includes the intent to gratify a desire for pleasure or excitement. See, e.g., State v. Kissinger, 922 S.W.2d 482, 489-490 (Tenn. 1996). In contrast, our supreme court has acknowledged that "not every offender commits [rape] for the purpose of sexual fulfillment." State v. Arnett, 49 S.W.3d 250, 261-262 (Tenn. 2001); see also State v. Charles R. Blackstock, No. E2000-01546-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 659, at

[8]Even assuming an excellent record of employment, the appellant's significant arrearage of child support payments would undercut any mitigation to the extent the arrearage was incurred prior to the appellant's incarceration for these offenses. However, the cause of the arrearage is unclear from the record.

*17 (Knoxville, August 27, 2001). In determining the applicability of enhancement factor (7) to a rape conviction, the critical question is the defendant's motive. Blackstock, No. E2000-01546-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 659, at *17-18. Accordingly, in this case, the appellant's confession to initiating sexual activity with SS because he found her to be "terribly attractive" supports the trial court's application of enhancement factor (7) in determining the appellant's sentences for rape of a child.

We also conclude that the trial court properly applied enhancement factor (15) to the appellant's convictions of both rape of a child and aggravated sexual battery. Our supreme court has observed that, when an adult perpetrator and a minor victim are members of the same household, "the adult occupies a position of 'presumptive private trust' with respect to the minor." State v. Gutierrez, 5 S.W.3d 641, 645 (Tenn. 1999); cf. also Carico, 968 S.W.2d at 286. It was undisputed in this case that the appellant and SS were members of the same household at the time of these offenses. Moreover, even absent a "presumptive private trust," the appellant's own descriptions of his relationship with SS established his abuse of a position of private trust. Indeed, the evidence adduced at trial suggested that the appellant specially fostered a relationship of confidence between himself and SS by permitting her to smoke, drink alcohol, and drive a car without her mother's consent or knowledge.

Finally, we note that the appellant's prior misdemeanor conviction of writing worthless checks supports the application of Tenn. Code Ann. § 40-35-114(1) to his convictions of rape of a child and aggravated sexual battery, albeit this factor is entitled to little weight. Cf., e.g., State v. Williamson, 919 S.W.2d 69, 82 (Tenn. Crim. App. 1995); State v. Samuel Paul Fields, No. 01C01-9512-CR-00414, 1998 Tenn. Crim. App. LEXIS 244, at **25-26 (Nashville, February 26, 1998). Accordingly, the appellant's convictions of rape of a child were subject to enhancement pursuant to factors (1), (7), and (15), and the appellant's convictions of aggravated sexual battery were subject to enhancement pursuant to factors (1) and (15). Tenn. Code Ann. § 40-35-114. Both convictions of rape of a child and convictions of aggravated sexual battery were negligibly mitigated by the appellant's prior military service. Tenn. Code Ann. § 40-35-113(13). Because we consider the appellant's abuse of a position of private trust to be the determinant factor, we leave the appellant's sentences undisturbed. Cf. State v. Lavender, 967 S.W.2d 803, 809 (Tenn. 1998); see also State v. Boggs, 932 S.W.2d 467, 475-476 (Tenn. Crim. App. 1996)(observing that there is no mathematical formula for valuating the enhancement factors to calculate the appropriate sentence).

III. Conclusion

For the foregoing reasons, we reverse the appellant's convictions of aggravated sexual battery and rape of a child for Counts Four, Nine, and Fourteen of the indictment, dismiss Count Nine of the indictment, and remand Counts Four and Fourteen to the trial court for a new trial or other proceedings consistent with this opinion. Additionally, we merge the appellant's convictions of aggravated sexual battery for Counts Six, Seven, and Eight into his convictions of aggravated

sexual battery for Counts One, Two, and Three. We thus leave undisturbed the appellant's convictions of and sentences for three counts of rape of a child and three counts of aggravated sexual battery. However, because the trial court found consecutive sentencing to be appropriate for one of the convictions that we have reversed, we also remand this case to the trial court to afford it an opportunity to reconsider whether consecutive or concurrent sentences are appropriate for the remaining aggravated sexual battery convictions. Cf. State v. Lewis, 958 S.W.2d 736, 740 (Tenn. 1997); Herring, No. M1999-00776-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 684, at *25.

_____

NORMA McGEE OGLE, JUDGE